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National Cable Television Association

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April 26, 1994

A. Katz -
FYI - FP
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reaction on this.
Status? Thanks -
MCK

William E. Kennard, Esquire
General Counsel
Federal Communications Commission
1919 M Street, NW., Room 614
Washington, D.C. 20554

Re: Clarification of Federal, State and Local Jurisdiction Over Permitted Rate and Channel Changes

Dear Mr. Kennard:

On behalf of the National Cable Television Association I am writing to request clarification with respect to federal, state and local regulatory authority over changes to rates or programming on a cable operator's regulated tiers.

Section 3(f) of the 1992 Cable Act, the federal negative option billing provision, provides that "A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." See 47 C.F.R. § 76.981. In its recent Third Order on Reconsideration the Commission held that "the Commission as well as state and local governments have concurrent jurisdiction to regulate negative option billing."[1]

We seek clarification with respect to the applicability of state or local negative option billing prohibitions to situations in which:

(1) a cable operator raises its rates (with no change in service or equipment offerings) as a result of passing through external costs or an inflation adjustment, as provided by the Commission rules;

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[1] Third Order on Reconsideration in MM Docket Nos. 92-966 and 92-262, FCC 94-40 (rel. Mar. 30, 1994), at ¶ 123.

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(2) an operator changes its rates as a result of the addition or deletion of channels to its regulated tiers pursuant to the Commission's "going forward" regulations; or

(3) an operator replaces an existing channel of service on a regulated tier with a different channel of service, with or without a change in the rates.

We seek confirmation that, under these circumstances, the operator need not have received an "affirmative request" from its subscribers for the rate increase or channel change, i.e., that such rate increases or channel changes will not be deemed subject to the negative option billing prohibitions. Moreover, since these situations plainly "implicate 'rates for the provision of cable service'," we seek confirmation that state and local authorities are pre-empted from enacting or enforcing laws that hold such practices to be prohibited negative options.

Discussion

In the initial rate regulation Report and Order the Commission took note of the legislative history of the negative option billing provision and held that it does not apply to changes in the mix of programming on a tier.[2] Accordingly, it concluded that

> a change in the mix of channels in a tier, including additions or deletions of channels, will not be subject to the negative option billing provision unless they change the fundamental nature of the tier. We agree with CSC that operators need this flexibility to modify and upgrade their offerings in response to marketplace changes. Moreover, we do not believe that consumers necessarily expect the mix and range of services in a tier to remain static. Thus, on balance, we conclude that the consumer benefits from giving operators the ability to diversify, improve or otherwise modify their offerings in a tier outweighs the slight reduction in consumer choice that would result from exempting such changes from the negative option billing requirements.[3]

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[2] Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-966, 8 FCC Rcd. 5631, 5906 (1993) ("Report and Order").

[3] Id.

Significantly, for purposes of this letter, the Commission also determined that rate changes accompanying changes in programming subject to regulation would not be subject to negative option billing requirements:

> We also observe that if we subjected relatively minor tier changes to the scope of the provision, subscribers might well perceive the need to resubscribe each time such a change occurred as a burden, rather than a benefit. Moreover, any actual or implicit change in price accompanying programming changes would be subject to our rate regulations -- to basic rate review at the local level and to review of cable programming service complaints at the FCC. We do not believe it necessary . . . also to subject any service changes accompanied by a price increase to negative option billing requirements. We note that our customer service rules require operators to give subscribers 30-days advance notice of any changes in rates, programming or channel positions. We do not believe subscribers also need the additional protection of the negative option billing provision for every proposed rate increase, unless a price change accompanies a fundamental change in service, such as the addition of a tier.[4]

Finally, the Commission concluded:

> restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions, will not bring the negative option billing provision into play if subscribers will continue to receive the same number of channels and the same equipment. As NCTA suggests, a subscriber presumably has already "affirmatively requested" this level of service. However, as with other changes in the mix of programming services, restructuring will be subject to the negative option billing provision, if the restructuring effects a fundamental change in the nature of the service subscribers receive. We agree with Time Warner that retiering accompanied

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[4] Id. at 5906-07 (footnote omitted; emphasis added).

> by a price increase is likely to be subject to rate regulation scrutiny.[5]

It thus seems clear that, as a matter of federal law, rate increases resulting from the FCC-approved passing through of external costs or inflation adjustments as well as rate channel changes resulting from the addition or deletion of programming to a regulated tier would not run afoul of the negative option billing prohibitions; and an operator need not receive an affirmative request from subscribers to institute such changes.

A question arises, however, over whether state and local authorities may enforce their negative option billing laws against these same practices. We think it clear that since the proposed situations at issue plainly implicate rate regulation and clearly are not violative of federal negative option billing requirements, state and local authorities are pre-empted from enforcing their laws in a manner inconsistent with the federal determinations.

In the Third Order on Reconsideration the Commission concluded:

> [W]e believe that the 1992 Cable Act generally does not preempt state and local governments from regulating negative option billing practices of cable operators under state or local consumer protection law. We note, however, that Section 3(a) of the 1992 Cable Act provides that states and franchising authorities may regulate "the rates for the provision of cable service" only to the extent provided by the statute in accordance with rules established by the Commission. As explained above, we believe that in typical circumstances regulation of negative option billing does not implicate "rates for the provision of cable service," but rather simply addresses billing practices of cable operators, activity which seems more in the nature of consumer protection than rate regulation. Therefore, we conclude that Section 3(a) of the 1992 Cable Act generally does not "specifically preempt" state and local governments from enacting and enforcing state or local consumer protection laws that may address negative option billing practices of cable

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[5] Id. at 5907-08 (footnotes omitted). The Commission also concluded that rate increases accompanying equipment changes are not within the scope of the negative option billing provision since, inter alia, the rate regulation provisions would apply to such increases. Id. at 5908.

> operators. Should we become aware of a particular situation, (e.g., through petition for declaratory ruling), in which state or local regulation of negative option billing goes beyond consumer protection and instead approaches actual regulation of "rates for the provision or cable service," or otherwise goes beyond consumer protection law, we will consider the question of federal preemption in that specific factual context.[6]

The rate increases and programming changes which are the subject of this letter plainly implicate rates for the provision of regulated services as opposed to the marketing or billing of those services. For this reason, as noted above, the Commission has effectively concluded that such rate increases or programming changes are not subject to the federal negative option billing prohibitions. For like reasons, the Commission should pre-empt state and local regulation of such practices.

The practical consequences of permitting the myriad of state and local authorities to construe permitted rate increases or channel changes to be negative options would be far-reaching. Under such a scenario a cable operator would be effectively precluded from achieving the return permitted by the FCC (i.e., the rate increases permitted by the price cap and "going forward" regimes) without first seeking the affirmative assent of each of its subscribers. More significantly, under the relevant state or local law, each subscriber who did not affirmatively "request" the "service" would have its service discontinued -- and most subscribers would not even realize the reason for such a cut-off. As the Commission itself suggested, requiring the resubscription of each subscriber with every permitted rate increase or channel change would be perceived as a burden on, not a benefit to, those subscribers. Surely the Commission did not intend to permit state and local "concurrent jurisdiction" over negative option billing to operate in this manner.

For this reason, we ask the Commission to clarify that when rates are raised on existing tiers as a result of an FCC-permitted inflation adjustment or external cost pass-through or when an operator's regulated channel complement is changed pursuant to the FCC's "going-forward" methodology or when a new program channel is substituted for a pre-existing channel on a regulated tier, those actions will not be considered "negative options". Accordingly, the operator need not affirmatively market those "service changes" by name nor may state or local authorities regulate such changes regardless of how the local requirement is characterized.

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6 Third Order on Reconsideration at ¶ 131 (emphasis added).

Because this question is of widescale applicability to cable operators and programmers, and does not depend on the facts of a particular franchising situation, we urge you to promptly clarify the applicability of the FCC's negative option billing rules to these circumstances.

Sincerely,

Daniel L. Brenner

cc: Blair Levin
Merrill Spiegel
Maureen O'Connell
Byron Marchant
Lisa Smith
James Coltharp
Kathy Wallman
Alexandra Wilson

DLB:ldh